Supreme Court, U.S.
FILED

No. _____

031232 FEB 25 2004

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In The Supreme Court of the United States

JUAN JOSE VALLADARES-HELGUERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals overlooked a material fact and gave significant weight to wiretap testimony that did not meet the Governments burden of proof. The Court of Appeals ruled as to the admissibility of this evidence and not on whether the tapes satisfied the Governments burden. The Defendant does not challenge the admissibility of the tapes, but challenges whether the tapes meet the preponderance of the evidence standard.

Lyle J. Yurko, attorney on behalf of Juan Valladares, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

LIST OF PARTIES TO PROCEEDING

The parties in the proceeding below are those listed in the caption.

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OPINIONS BELOW

The District Court entered judgment on January 13, 2003. The Court of Appeals affirmed the judgment of the District Court on October 16th, 2003 in an unpublished opinion. (App. 1a) A petition for rehearing was denied on November 25, 2003. (App. 8a)

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court on October 16th, 2003 in an unpublished opinion. A petition for rehearing was denied on November 25, 2003. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

This case is before the Court from an indictment from the Western District Grand Jury July 10, 2000, charging Appellant with conspiracy to possess with intent to distribute and distribute cocaine, cocaine base, and marijuana and money laundering. (App. 31a)

The Defendant pled guilty on March 8, 2001 to one count of conspiracy to possess with intent to distribute and distribute cocaine, cocaine base, and marijuana and one count of money laundering.

On December 19, 2002, Valladares appeared before the Honorable Richard L. Voorhees at the above case for sentencing. The court imposed a sentence of Life at Count one and a sentence of twenty (20) years at

Count two to run concurrent with his sentence at count one.

A Notice of Appeal was filed on December 30, 2002.

Prior to sentencing, the Defendant objected to findings in the pre-sentence investigation report concerning his role of leadership in the conspiracy and an adjustment of the offense level for possessing a firearm in the course of the conspiracy. On the day the defendant appeared for sentencing, he contested the computation of his base offense level maintaining that the cocaine base was not reasonably foreseeable to him is part of the conspiracy. (App. 11a)

To support the government's position that the defendant was a leader of the alleged conspiracy, that at least 1.5 kilograms of crack cocaine was reasonable foreseeable as part of the conspiracy, and that the defendant possessed a firearm during the course of the conspiracy the government called U.S. Customs agent, Roger Jernigan. (App. 13a).

Valladares testified at the hearing to refute the testimony of the government. (App. 22a).

After hearing all the evidence and the arguments of counsel, the District Court determined that Valladares was not entitled to an adjustment for acceptance of responsibility. (App. 28a). The Court further held that Valladares objection concerning the crack cocaine was overruled. (App. 28a). The Court also found that Valladares was a leader and organizer. (App. 28a). The

Court did not specifically rule on Valladares' objection to the weapon enhancement. (App. 28a).

The Court found Valladares to have a criminal history category of one (I). (App. 29a). The Court imposed a sentence of life imprisonment on Count one and a sentence of twenty years on Count two running concurrently. (App. 30a).

On December 30, 2002, Valladares, through counsel, filed a timely Notice of Appeal. (JA 88). This case is now in the Fourth Circuit Court of Appeals pursuant to this Notice.

STATEMENT OF FACTS

To support findings of the pre-sentence investigation report of challenged by Valladares, the government called one witness at Valladares' sentencing hearing, Roger Jernigan. U.S. Customs Agent Jernigan testified that he began investigating the Appellant following the arrest of an individual named Jimmy Philbeck. Mr. Philbeck stated that one of his marijuana and cocaine sources was Jose Valladares and described Valladares as his "boss". (App. 14a).

Jernigan also testified that during the course of the investigation, telephone conversations were wiretapped between the Defendant and an individual named Juan Mercado. (JA 60). During a three day period, the two talked numerous times and Mercado was complaining about the quality of the cocaine. (App. 15a). Jernigan did not testify as to the exact words or nature of the complaints of the quality nor did he specify

whether the conversation was in Spanish or English. However, when Mercado was later debriefed, he stated that he believed Valladares knew that the cocaine was being cooked into crack because he was concerned about providing the highest quality of cocaine powder. (App. 16a).

When questioned about the amount of crack that was foreseeable to Valladares, Jernigan states, " according to Mr. Philbeck... there is no evidence about that, just powder cocaine". (App. 16a). As to cocaine sold to Mercado, Jernigan states that Valladares sold him 20 to 30 kilos of powder and estimates "a large amount was cooked into crack". (App. 17a). Jernigan then names two more customers of Valladares but does not mention any amounts discussed with respect to cooking cocaine into crack. (App. 17-18a). In response to the government's question of the amount of cocaine base that was foreseeable to Valladares, Jernigan offered "a conservative estimate, maybe 20 to 25 kilograms." (App. 18a).

Jernigan was asked about members of the conspiracy that carried firearms. Jernigan stated that some members did carry firearms. (App. 20a). When questioned as to whether those firearms were known to Valladares, Jernigan stated, "I know he was arrested at one point in time during the conspiracy with a firearm and marijuana." (App. 20a). When questioned as to whether they were in a vehicle, Jernigan stated, "To be honest, I don't recall at the time." (App. 20a). The government asked if Jernigan could relate the marijuana and the gun and again he responded, "I believe it was in

a vehicle but I do not- I do not recall at this time." (App. 20a).

Mr. Valladares testified at his sentencing hearing. (App. 22a). Prior to his testimony, the Court confirmed that he has discussed various sentencing issues with his attorney with the assistance of an interpreter. (App. 22a).

Mr. Valladares pled guilty and accepted responsibility for being involved in a conspiracy to possess with intent to distribute and distributing cocaine and marijuana. (App. 23a). Mr. Valladares denied selling crack or having any knowledge that the cocaine he sold would be cooked into crack. (App. 23a). Valladares testified that when his customers complained about the quality, he understood it to mean that the cocaine was "not good for the nose". (App. 26a). Again, it was not made clear to the court whether these conversations between the Defendant and his customers were spoken in Spanish or English.

REASONS FOR ALLOWANCE OF WRIT

THE DISTRICT COURT ERRED IN FINDING THAT THE CRACK PORTION OF THE CONSPIRACY WAS REASONABLY FORESEEABLE TO VALLADARES WHEN SUCH A FINDING WAS CONTRARY TO THE EVIDENCE PRESENTED.

Standard of review:

The Court of Appeals is bound by the district court's factual finding unless such determinations are clearly erroneous. United States v. White, 875 F.2d 427, 431 (4th Cir. 1989) This court has consistently held that "facts relevant to a sentencing determination need only be proved by a preponderance of the evidence." United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000) (citing United States v. Urrego-Linares, 879 F.2d 1234, 1237-38 (4th Cir. 1989)), *cert. denied*, 122 S. Ct. 39 (2001). The Court of Appeals for the Fourth Circuit has misapplied a critical fact which has resulted in a life sentence for the defendant.

The Appellant contends that trial courts finding that the crack portion of the conspiracy was reasonably foreseeable to the Appellant was clearly erroneous. The evidence offered does not meet a preponderance of the evidence standard.

In the instant case, Valladares admitted selling powder cocaine but the Government argued that it should have been reasonably foreseeable to the defendant that the powder was being turned into crack by his customers. This determination resulted in denial of acceptance of responsibility and therefore a mandatory life sentence.

Mr. Valladares is a Mexican National. He stated that he cannot speak or understand English. He needed an interpreter in order to testify at sentencing. (App. 22a) In this testimony Valladares said that he had no knowledge of the cocaine being cooked into crack. (App.

23a) The District Court judge stated that this testimony by Valladares was "incredible." (App. 28a) However, the only evidence offered against him regarding this issue was the testimony of Agent Roger Jernigan regarding taped conversations. No representations were made as to whether the taped conversations were in English or Spanish. No representations were made as to whether Valladares understood the conversations at all. No evidence was offered as to how Agent Jernigan understood the tapes or who translated those tapes if needed.

In the Court of Appeals ruling, it was stated that, "Valladares does not suggest nor provide any evidence that the conversations were not clearly understood." During cross-examination Valladares stated that he only knew of complaints that the cocaine was "not good for the nose".

It is unreasonable and clearly erroneous that the District Court could find by a preponderance of the evidence that it was reasonably foreseeable that Valladares knew the cocaine was being cooked into crack when under oath he testified that he had no such knowledge and the only evidence offered against him was testimony about tapes that made no mention of the language of those recordings and no representation that the defendant understood them. The assigned panel of the Court of Appeals having misapplied this critical fact and having ruled on admissibility and not the proper weight to be given this critical evidence now requires that a writ of certiorari be granted especially in light of the fact that this mis-decision results in a life term for the Defendant.

Juan Jose Valladares respectfully requests the Supreme Court of the United States to grant this petition for writ of certiorari.

Respectfully submitted this 25th day of February, 2004

/s/ Lyle J. Yurko
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